



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Braswell Shipyards, Inc.  
File: B-233287; B-233288  
Date: January 3, 1989

### DIGEST

1. Protest against agency decision to request best and final offers (BAFOs) is denied. Generally, in a negotiated procurement, there is nothing improper in requesting BAFOs from all offerors. In any event, in the absence of a provision in solicitations informing offerors that award might be made on the basis of initial offers, the agency could not make such an award and thus agency had no choice but to amend solicitations and request BAFOs.
2. While a preaward survey can in a particular case give rise to the inference that an offeror's price is not low in relation to that of the surveyed offeror, this does not mean that such necessary action on the part of the government constitutes an auction in the absence of a price leak.

### DECISION

Braswell Shipyards, Inc., protests the award of two separate contracts under request for proposals (RFP) Nos. N62673-88-R-0243 and N62673-88-R-0238, issued by the Department of Navy for the repair of USS MOUNT BAKER and USS LOS ALAMOS. Because the protests are virtually identical, they will be considered together. Braswell alleges that the agency improperly amended the solicitations merely to correct a "minor irregularity" after the date for receipt of initial proposals and improperly requested best and final offers (BAFOs). In addition, it alleges that the Navy, through a preaward site visit to Braswell and through the request for BAFOs, alerted other offerors of their price standing relative to Braswell's low offer.

We deny the protest.

Initial proposals were received on October 5, 1988. Braswell submitted the lowest priced offers, and the Navy, by telephone, requested preaward data from Braswell. The

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Navy confirmed the request with a letter to Braswell dated October 6. Shortly thereafter, however, the contracting officer discovered that the RFPs had improperly incorporated by reference Federal Acquisition Regulation (FAR) clauses applicable to sealed bids rather than negotiated procurements. On October 7, the contracting officer issued an amendment to the solicitations to include the proper provisions and requested BAFOs from all offerors, which were to be submitted by October 11. The protester states that on October 7 the Navy began an on-site preaward survey of Braswell's facility. However, after BAFOs were received, Braswell was no longer the low offeror under either RFP. Awards were made to the respective low offerors, and Braswell filed its protests with our Office on October 21.

The protester alleges that it was improper to issue an amendment to the solicitations because the solicitation defects were merely minor irregularities. The protester also argues that the solicitations should not have been "reopened" but that awards should have been made on initial proposals. As stated earlier, the agency amended the solicitations to remove sealed bidding provisions and to incorporate the provisions appropriate for negotiation, including the provision required by statute, see 10 U.S.C. § 2305(a)(2)(B)(ii) (Supp. IV 1986), alerting offerors to the fact that the agency might make award on initial proposals.<sup>1/</sup> While we think that the agency acted reasonably in amending the RFPs to incorporate the provisions required to be in them, we find the requests for BAFOs to be unobjectionable in any event. Simply stated, there is nothing improper in an agency's requesting a BAFO in a negotiated procurement. Metron Corp., B-227014, June 29, 1987, 87-1 CPD ¶ 642. In fact, the usual sequence of events in a negotiated procurement includes at least one request for revised offers; it is the award on the basis of initial proposals that is less frequent, and that, by law, can only be done in limited circumstances. See 10 U.S.C. § 2305(b)(4) (Supp. IV 1986). Moreover, in the absence of a provision in the RFPs informing offerors that award might be

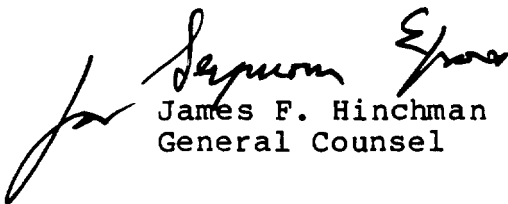
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<sup>1/</sup> Prior to the amendment, the RFP did not reserve the right of the government to make award on the basis of initial proposals.

made on the basis of initial proposals, the agency could not make such an award. FAR § 15.610(a). Consequently, the agency had no choice here but to amend the solicitations and allow the submission of revised proposals.<sup>2/</sup>

Braswell also argues that an on-site preaward survey conducted by the Navy alerted other offerors that Braswell was in line for both awards, thus creating an "illegal auction atmosphere." Even assuming that other offerors were aware of a preaward survey or a request for preaward data, we have held that although it is possible that the mere initiation of a preaward survey can, in a particular case, give rise to the inference that an offeror's price is not low in relation to that of the surveyed offeror, such necessary action of the part of the government does not constitute an auction. The B.F. Goodrich Co., B-230674, May 18, 1988, 67 Comp. Gen. \_\_\_, 88-1 CPD ¶ 471. Further, we have stated that even if an offeror had substantially lowered its price between its initial proposal and its BAFO, this does not indicate the existence of a price leak since it is not uncommon for an offeror to withhold its lowest price until BAFOs are submitted. Omni-Wave Electronics Corp., B-188370, Apr. 28, 1977, 77-1 CPD ¶ 291. Absent a price leak or other disclosure, which Braswell has not alleged, we do not think that the circumstances here gave rise to an auction atmosphere.

The protest is denied.

  
James F. Hinchman  
General Counsel

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<sup>2/</sup> While Braswell argues that the same sealed bidding provisions were erroneously included in prior negotiated solicitations which resulted in contracts, we have held that the fact that an agency may have erroneously made awards in the past in similar circumstances is irrelevant since improper award in one or more procurements does not justify repetition of the same error. See Inscom Electronics Corp., B-225858, Feb. 10, 1987, 87-1 CPD ¶ 147.